FILLING THE LEGAL GAP: THE PROHIBITION OF NUCLEAR WEAPONS
At the December 2014 Conference on the Humanitarian Impact on Nuclear Weapons in Vienna, Austria made a pledge calling on “all states parties to the NPT to renew their commitment to Article VI [of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)], and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.”

The key “legal gap” that needs to be filled is the explicit prohibition of nuclear weapons and establishment of a framework for their elimination. The other weapons of mass destruction, biological and chemical weapons, are prohibited and subject to elimination processes through international legal instruments. It is past time that nuclear weapons are put on the same legal footing.

The “legal gap” regarding prohibition and elimination arises from various deficits in the regulation of activities involving nuclear weapons, as currently codified. This includes legal deficits regarding the development, production, testing, transfer, acquisition, transit, stockpiling, deployment, threat of use or use of nuclear weapons, as well as assistance, financing, encouragement, or inducement of these activities. The current international legal regulation of nuclear weapons is fragmentary, with several instruments covering only certain areas or activities. The legal gap also arises because the rules in the existing instruments on nuclear weapons apply to different states in different ways. Thus what is needed is a comprehensive instrument that prohibits all activities involving nuclear weapons in all circumstances for all states parties.

The table overleaf summarises the gaps in existing treaty law related to nuclear weapons. A treaty banning nuclear weapons, by categorically prohibiting nuclear weapons and establishing a framework and impetus for their elimination, would help to fill these gaps. Such a treaty would build on existing norms and reinforce existing legal instruments, but it would also close loopholes in the current legal regime that enable states to engage in nuclear weapon activities or otherwise to claim perceived benefit from their continued possession and deployment while purporting to promote their elimination.

The negotiation of a treaty banning nuclear weapons should fill the legal gap regarding the prohibition of nuclear weapons by providing clear common obligations with respect to the issues outlined in the chart. Whilst some aspects of the current legal framework are to be applauded, the overall patchwork of partial regulation hampers development of a clear normative recognition that nuclear weapons are unacceptable. In doing so, it facilitates retention of these weapons by certain states, which may in turn incentivize proliferation. History shows that legal prohibitions of weapon systems—their possession as well as their use—facilitate their elimination. Weapons that have been outlawed increasingly become seen as illegitimate. They lose their political status and, along with it, the money and resources for their production, modernisation, proliferation, and perpetuation. Even if nuclear-armed states do not join initially, a treaty banning nuclear weapons would have a significant normative and practical impact.

States should commence negotiations in 2015 on a treaty banning nuclear weapons as an effective measure for nuclear disarmament. At a time when the nuclear-armed states continue to demonstrate their lack of commitment to pursuing tangible, good faith nuclear disarmament, as international tensions rise, and as the potential for accidents persists, banning nuclear weapons is an urgent necessity.
There are no specific international obligations to engage in efforts to decontaminate or remediate areas affected by nuclear weapon detonations, whether through testing, use, or production. There is no international legal instrument that provides a framework for victims and survivors of nuclear weapons collectively to seek assistance towards the full realisation of their rights.

All NWFZ treaties contain obligations on parties not to assist other states with acts prohibited under the treaties. This includes any means of producing nuclear weapons, nuclear testing, or the transit or deployment of nuclear weapons. Under article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, states are legally responsible where they knowingly assist with acts that are wrongful both for themselves and the state they are assisting.

The use of a nuclear weapon is implicitly prohibited to non-nuclear-armed states parties to the NPT under articles I and II of that Treaty, in its prohibition of such states assuming “control” (i.e. the independent power to use nuclear weapons). There is no explicit treaty prohibition against financing of the production, maintenance, or modernisation of nuclear weapon systems. Companies in non-nuclear-armed states are currently contributing to the modernisation of nuclear arsenals. Rules of international human rights law, international environmental law, international health law, UN Charter law, and other branches of international law would also likely be violated.

The International Court of Justice ruled in its 1996 advisory opinion on nuclear weapons by 11 votes to 3 that “there cannot exist in international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”

The Outer Space Treaty prohibits placing any objects carrying nuclear weapons in orbit around the earth; the installation of such weapons on celestial bodies; and stationing in outer space. Stockpiles of nuclear weapons are stationed on the territories of nuclear-armed states and their allies. The deployment of nuclear weapons is not prohibited by the NPT or by any other international treaty or instrument.

The transit of nuclear weapons is not prohibited by any treaty. Nuclear-armed states parties may transport nuclear weapons across the territories of non-nuclear-armed states parties, including through non-nuclear-armed states parties to the NPT, if they believe that the transit is necessary for purposes of international security.

There are no explicit prohibitions on nuclear testing by states parties. Four explicitly prohibit states parties from engaging in nuclear testing, but three parties do not (the Pelindaba Treaty, Rarotonga, and Semipalatinsk). The NPT does not explicitly prohibit or universally accepted rule of customary international law on the use or threat of use of nuclear weapons.

There is no explicit treaty prohibition on the acquisition or development of nuclear weapons. NPT nuclear-armed states are not prohibited to assist each other in the production of nuclear weapons. NPT nuclear-armed states are not prohibited to assist each other in the production of nuclear weapons.

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3. Five NWFZ treaties cover 115 countries (60% of UN member states); Mongolia has separately declared itself a nuclear weapon free zone. Some states have also outlawed nuclear weapons in their constitutions or domestic legislation. The five NWFZ treaties are: Tlatelolco (covering Latin America and Caribbean NWFZ), Rarotonga (South Pacific), Pelindaba (Africa), Bangkok (Southeast Asia), and Semipalatinsk (Central Asia). For a comparative analysis of legal obligations arising under NWFZ treaties, which informs this table, see “Nuclear Weapon Free Zones and Banning Nuclear Weapons,” Article 36, April 2014, http://www.article36.org/?p=684.

4. China, France, Russia, and the UK have ratified these protocols.


6. See the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001) and the Commentary thereto, §§2-4. For a recent discussion, see Martina Kunz and Jorge E. Viñuales, “Environmental approaches to nuclear weapons,” in Gro Nystuen et al. (Eds.), Nuclear Weapons Under International Law, Cambridge University Press, 2014.

7. China, Democratic People’s Republic of Korea, Egypt, India, Iran, Israel, Pakistan, and the US.

8. The US understanding of control, based on the US Senate’s interpretation that was reportedly uncontested during NPT negotiations, is that control means the independent power to use nuclear weapons. See Hon. Brian Donnelly, “The Nuclear Weapons Non-Proliferation Articles I, II and VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” presentation at the conference “Non-Proliferation: Point of View from Latin America and the Caribbean,” Cancún, Mexico, 11-13 January 1995, http://www.opanal.org/Articles/cancun/can-Donnelly.htm.


11. International Court of Justice, op. cit., p. 266.

12. Ibid.


NOTES

Article 36 is a UK-based not-for-profit organisation working to prevent the unintended, unnecessary or unacceptable harm caused by certain weapons.

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Reaching Critical Will is the disarmament programme of the Women’s International League for Peace and Freedom (WILPF).

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